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No. 93-274

In the

Supreme Court of the United States

October Term, 1993

GOLDEN GATE HEIGHTS INVESTMENTS,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

Petition for Writ of Certiorari to the California First District Court of Appeal

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this court for leave to file the accompanying brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing

of this brief has been granted by counsel for petitioner and the letter of consent has been lodged with the clerk of this Court. Consent has been withheld by counsel for respondent City and County of San Francisco thereby requiring the filing of this motion.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Its attorneys were counsel of record in the landmark United States Supreme Court case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves the use of predatory land use policies by the City and County of San Francisco (City) to justify the uncompensated physical appropriation of an easement over petitioner's land. The opinion below upholds an eminent domain proceeding that deprives petitioner of most of the value of its property. This deprivation was based on the City's assertion that the value of petitioner's property would otherwise have been diminished by the uncompensated seizure of an easement via the application of restrictive land use regulations.

The court below acquiesced in the City's violation of petitioners' fundamental rights by refusing to apply heightened scrutiny to the City's actions, as required by this Court in *Nollan v. California Coastal Commission*. If allowed to stand, the opinion below will constitute a serious

setback for individual rights by undermining this Court's careful efforts over the past two decades to restore full constitutional protection to private property rights.

Amicus firmly believes that review by this Court is necessary to resolve the conflicts created by the California courts in their efforts to avoid complying with *Nollan*.

DATED: September ____, 1993.

Respectfully submitted,

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TABLE OF CONTENTS

Page

CASES

TABLE OF AUTHORITIES CITED vi

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE COURT BELOW ERRED IN NOT APPLYING HEIGHTENED SCRUTINY TO THE CITY'S SEIZURE OF AN EASEMENT ACROSS PETITIONER'S LAND 5

II. THE REFUSAL OF THE COURT BELOW TO COMPLY WITH THIS COURT'S NOLLAN MANDATE HAS DEPRIVED PETITIONER OF FEDERAL CONSTITUTIONAL SAFEGUARDS GUARANTEED TO ALL AMERICANS 7

CONCLUSION 11

TABLE OF AUTHORITIES CITED

Page

CASES

Agins v. City of Tiburon,
447 U.S. 255 (1980) 5

Blue Jeans Equities West v. City
and County of San Francisco,
3 Cal. App. 4th 164 (1992) 8-9,11

Loretto v. Teleprompter Manhattan
CATV Corp., 458 U.S. 419 (1982) 5

Nollan v. California Coastal
Commission, 483 U.S. 825 (1987) 3-4,6-11

Yee v. City of Escondido, 503 U.S.
___, 118 L. Ed. 2d 153 (1992) 4,9,11

UNITED STATES CONSTITUTION

Amendment V 5

MISCELLANEOUS

R. S. Radford, Statistical Error
and Legal Error, 21 Loy. L.A.
L. Rev. 843 (1988) 10

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of amicus Pacific Legal Foundation (PLF) is set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

In 1986 petitioner Golden Gate Heights Investments (GGHI) bought an undeveloped parcel of land within the jurisdiction of the City and County of San Francisco. In accordance with the property's then-existing zoning, petitioner proceeded with plans to develop 14 residential homesites on the parcel. The City responded with a resolution to acquire the property and brought condemnation proceedings under its powers of eminent domain.

At trial, petitioner established that it had a reasonable investment-backed expectation of developing and selling 14 residential homesites on its property. Such use was consistent with all existing zoning, planning, and other regulations at the time petitioner purchased the property and began development activities.

The City did not deny that petitioner had the legal right to develop 14 homesites on its property, nor was there any dispute that petitioner had a reasonable, investment-backed expectation in such development. Rather, the City argued that it would never have allowed petitioner to exercise its constitutional right to develop its property!

Although the City's own planning code clearly authorized the development of 14 homesites on petitioner's property, the City claimed it would have simply confiscated the equivalent of 9 of these sites, demanding that

they be dedicated to public use as a condition for approving development of the remaining 5 sites. **Since the City would not have paid compensation for the *regulatory* confiscation of petitioner's property, the City urged that it should not be required to compensate petitioner for the *physical* taking of these same sites via eminent domain!**

The trial court agreed with this astounding reasoning and awarded petitioner no compensation for the City's seizure of nearly two-thirds of the property in question. Compensation was required for the value of only five of petitioner's homesites, allowing the City to seize the equivalent of the other nine sites without payment.

SUMMARY OF ARGUMENT

The Takings Clause of the Fifth Amendment to the United States Constitution requires payment of just compensation when private property is taken for public use.

In *Nollan v. California Coastal Commission*, this Court established a requirement of heightened judicial scrutiny for courts examining property regulations challenged as regulatory takings. 483 U.S. 825, 834 n.3 (1987). The deferential standard of review appropriate to due-process inquiries was specifically rejected as inadequate for takings cases. *Id.*

In the present case, petitioner suffered the uncompensated taking of an easement over his property by the City and County of San Francisco. In condemnation proceedings, the City was awarded a portion of petitioner's land--the equivalent of nine buildable homesites--without payment of compensation. The City's rationale for this confiscation was that, if petitioner had proceeded with its plans to develop the property, the City would have seized an equivalent easement in exchange for issuing building permits on the remaining five homesites.

Petitioner raised what should have been a self-evident argument--that the City's proposed regulatory seizure of nearly two-thirds of the property would itself have required compensation under the Takings Clause. On appeal, however, the court below employed a series of tortured evasions to acquiesce in the City's confiscatory actions.

By rejecting the requirement of heightened scrutiny laid down by this Court in *Nollan*, the court below abjectly defers to the City's forcible appropriation of petitioner's land. Worse, the appellate panel justifies its holding by distorting and misstating this Court's holdings in *Nollan* and *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992).

The petition for certiorari should be granted not only to correct the manifest injustice petitioner has suffered but to

eliminate the doctrinal conflicts created by the California court in its efforts to avoid complying with *Nollan*.

ARGUMENT

I

THE COURT BELOW ERRED IN NOT APPLYING HEIGHTENED SCRUTINY TO THE CITY'S SEIZURE OF AN EASEMENT ACROSS PETITIONER'S LAND

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has long held that the Takings Clause can be violated by either of two broad categories of state action. Uncompensated physical invasions of property are *per se* violations of the Takings Clause under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Takings Clause is also violated by land use regulations that fail to substantially advance legitimate state interests or deprive the owner of economically viable use of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

In its leading case in the field of regulatory takings, this Court clearly established that land use regulations challenged under the Takings Clause must be subjected to a heightened standard of judicial review. Such enactments may

no longer be upheld merely by reference to a "rational relationship" to their asserted objectives:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, ... [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (citations omitted; emphasis in original).

Nollan involved the uncompensated seizure of an access easement by the Coastal Commission as a condition to the issuance of a building permit. This Court recognized that, had the Commission simply seized the easement outright, compensation would have been required by the Takings Clause. *Id.* at 831. *Nollan* went on to establish that compensation was also required if the easement was seized *by regulation*, so long as the property owners were not uniquely responsible for the harm being mitigated by the easement. *Id.* at 835 n.4. Most important, the decision required courts to closely examine such regulatory exactions to determine whether they are legitimate exercises of the police power or merely thinly disguised demands of extortion. *Id.* at 834 n.3.

The case at bar presents identical issues, with the addition of eminent domain proceedings. *Nollan* reaffirms that, if the City had simply seized a view easement across petitioner's property, compensation would be required under the Takings Clause. *Id.* at 831. Moreover, since petitioner is in no way responsible for the City's sudden desire to establish a view easement across this site, *Nollan* establishes that the City may not simply confiscate such an easement as a condition to the issuance of a building permit. *Id.* at 835 n.4.

By logical extension, if the City cannot simply expropriate the easement and may not seize it as a permit condition, the trial court erred in assigning no value to the easement at eminent domain. In effect, the trial court made the City a gift of an easement over petitioner's property. Even more important, the appellate panel erred in failing to apply heightened scrutiny to reveal the City's actual confiscatory role in these proceedings, as required by *Nollan*.

II

THE REFUSAL OF THE COURT BELOW TO COMPLY WITH THIS COURT'S NOLLAN MANDATE HAS DEPRIVED PETITIONER OF FEDERAL CONSTITUTIONAL SAFEGUARDS GUARANTEED TO ALL AMERICANS

The court below expressly recognized that petitioner raised a regulatory takings challenge under the United States Constitution. Disregarding the plain teaching of this Court,

however, the California panel declined to apply any meaningful scrutiny to the City's purported authority to confiscate a view easement across petitioner's land.

The City's case rests on its asserted authority to seize the equivalent of nine of petitioner's homesites in exchange for granting petitioner the "privilege" of developing the remaining five sites. Under *Nollan*, the court below was required to apply heightened scrutiny to this proposed regulatory seizure of property. Under any standard of review greater than fawning deference to state power, the City's actions would have been struck down as an "out and out plan of extortion." *Nollan*, 483 U.S. at 837.

Instead, the California court effectively asserts that *Nollan* does not exist. The appellate panel correctly observes that *Nollan* was not a physical takings case. *See*, Petitioner's Appendix at 3a-4a. But it also asserts that *Nollan* was not a regulatory takings case. *Id.* at 4a. Having thus "distinguished" this Court's landmark decision out of existence, the court below simply ignores the plain language of *Nollan* and looks the other way while the City confiscates petitioner's land.

In its haste to acquiesce in the City's uncompensated taking of property, the court below cites to its own erroneous holding in *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992). Petitioner's

Appendix at 4a. *Blue Jeans Equities*, a hopelessly garbled and self-contradictory opinion, proclaims that *Nollan's* heightened scrutiny requirement applies only to "possessory takings." The irony here is that the First Appellate District coined the *Blue Jeans* doctrine to avoid applying heightened scrutiny to the City's extortion of ***money*** from property owners. The forced exaction of ***land*** in exchange for the right to build--as in the case at bar--is precisely the sort of "possessory taking" that should trigger heightened scrutiny according to the *Blue Jeans* court itself.

The most glaring and outrageous misinterpretation of law in the opinion below is its citation to *Yee v. City of Escondido* for the proposition that *Nollan* involved a physical taking. Petitioner's Appendix at 4a. The entire thrust of this Court's holding in *Yee* was to ***distinguish*** *Nollan* from the physical taking theory unsuccessfully advanced by the plaintiffs in that case.

As the court below observes barely one paragraph later, *Yee* emphasized that a physical taking requires the forced submission of the property owner. *Yee*, 118 L. Ed. 2d at 165, *cited in* Petitioner's Appendix at 4a. This was obviously not the case in *Nollan*--the property owners would have been left in peace unless they insisted on exercising their constitutional right to build on their own property. Exactly the same situation pertains to the City's proposed

seizure of nine homesites if GGHI exercised its right to build five homes. The City's proposed regulatory taking of nine homesites *must* be subjected to heightened judicial scrutiny under *Nollan*. Instead, the court below applied no meaningful scrutiny whatever--beyond scrambling to create legal justifications for the City's confiscatory policies.

The rejection of *Nollan's* heightened scrutiny requirement by the court below is more than a simple mistake in the application of federal constitutional law. Rather, it amounts to a denial of fundamental rights guaranteed by the United States Constitution. The appropriate standard of judicial review is not a mere procedural detail. In close cases, the level of scrutiny determines the outcome of litigation. *See* R. S. Radford, *Statistical Error and Legal Error*, 21 LOY. L.A. L. REV. 843, 870-79 (1988). In the context of regulatory takings, the level of scrutiny determines whether individual property rights will be protected against predatory and confiscatory regulations--or not.

While California courts may be justified in departing from federal precedent in order to extend *greater* constitutional protections to California citizens than the federal courts provide, such is manifestly not the case here. To the contrary, the California Court of Appeal has *deprived* petitioner of important rights recognized and protected by the decisions of this Court.

CONCLUSION

The California court engaged in a tortured series of legal errors and contradictions in its devotion to upholding the City's confiscation of petitioner's land. The court declares that *Nollan* was not a physical takings case but, in the next breath, asserts that *Nollan* does not apply to regulatory takings. The court cites to its own erroneous holding in *Blue Jeans Equities* but then refuses to follow it. The court claims that *Yee* characterized *Nollan* as a physical takings case, yet it cites language from *Yee* plainly distinguishing *Nollan* from physical takings.

The net effect is a doctrinally incoherent opinion that will only exacerbate the already intense confusion that exists in the field of regulatory takings. For this reason, Pacific Legal Foundation respectfully urges this Court to grant the

petition for writ of certiorari in *Golden Gate Heights Investments v. City and County of San Francisco.*

DATED: September, 1993.

Respectfully submitted,

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